

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

RICHARD COOEY, et al.,

Plaintiff,

v.

TED STRICKLAND, et al.,

Defendants.

Case No. 2:04-cv-1156

JUDGE GREGORY L. FROST

Magistrate Judge Mark R. Abel

OPINION AND ORDER

This matter is before the Court for consideration of Defendants' Amended Motion to Dismiss (Doc. # 340), Plaintiff Mark Wiles' memorandum in opposition (Doc. # 341), and Defendants' reply memorandum (Doc. # 375). For the reasons that follow, this Court finds the motion well taken.

For purposes of the record, the Court notes as an initial matter that, after Wiles filed his memorandum in opposition *pro se* (Doc. # 341), counsel subsequently filed a notice of appearance on his behalf (Doc. # 363). On September 3, 2008, this Court therefore issued an Order in which it noted that "[c]ounsel for Wiles is free to either stand by the *pro se* memorandum contra that Wiles filed on August 11, 2008 (Doc. # 341) or file a new memorandum contra that would replace Wiles' filing." (Doc. # 365, at 2 n.2.) Via counsel, Wiles subsequently filed a September 10, 2008 notice in which he elected to stand on his *pro se* memorandum. (Doc. # 372.)

Wiles asserts claims under 42 U.S.C. § 1983 challenging multiple facets of the lethal injection protocol by which the State of Ohio intends to execute him. Defendants move for dismissal under Federal Rule of Civil Procedure 12(b)(6) on the ground that the Sixth Circuit's

decision in *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007), requires dismissal of the § 1983 claims asserted here. Previously, this Court issued an Opinion and Order in this litigation that discussed at length the Sixth Circuit's construction in *Cooey* of the statute of limitations for such § 1983 claims. (Doc. # 344.) The Court adopts and incorporates herein the entirety of that decision and attaches it to the instant decision for ease of reference.

As this Court noted in that prior decision, *Cooey* teaches that § 1983 claims of the sort asserted in this case begin to accrue upon conclusion of direct review in the state courts and when a plaintiff knows or has reason to know about the act providing the basis of his or her injury. *Id.* at 422. Even in light of recent changes to the lethal injection protocol and the United States Supreme Court's issuance of *Baze v. Rees*, 128 S. Ct. 1520 (2008)—the latter of which predated issuance of the *Cooey* mandate—the court of appeals issued *Cooey* as binding authority. This authority reasons that a plaintiff knew or had reason to know about the act providing the basis of his or her injury when Ohio made lethal injection the exclusive method of execution in December 2001. *Cooey*, 479 F.3d at 422. Consequently, review of the briefing and the record indicates that the following dates are relevant to the statute of limitations issue:

- (1) Date of Wiles' conviction and sentence: February 12, 1986.
- (2) Date the United States Supreme Court denied *certiorari*: October 5, 1992.
- (3) Date the Sixth Circuit has held inmates like Wiles should have been aware of their § 1983 lethal injection protocol claims: December 2001, at the latest.

In light of the foregoing, this Court concludes that the rationale of *Cooey* applies to Wiles' § 1983 claims. Although Wiles did obtain a favorable judgment in the state court of appeals related to a petition for post-conviction relief, that judgment did not at any time vacate

his sentence as death so as to disturb his § 1983 statute of limitations. *See State v. Wiles*, 126 Ohio App. 3d 71, 709 N.E.2d 898 (1998). The statute of limitations on these claims therefore expired, at the latest, in December 2003. Wiles has raised no arguments to save his claims that the Court did not previously consider and reject in its attached and incorporated Opinion and Order. Thus, because Wiles' assertion of his § 1983 claims is time-barred, the Court **GRANTS** Defendants' Amended Motion to Dismiss. (Doc. # 340.)

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE